

Office of Chief Counsel
Internal Revenue Service
Memorandum

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date: December 19, 2007

to: Edwin A. Herrera
Associate Area Counsel (Laguna Niguel, Group 3)
(Small Business/Self-Employed)

from: Pamela Wilson Fuller
Branch Chief, Branch 3 (Procedure & Administration)
(Procedure & Administration)

subject: Restart of Running of Period of Limitations/6672 Assessment Question

This Chief Counsel Advice responds to your request for assistance dated October 2, 2007. This advice may not be used or cited as precedent.

LEGEND

Taxpayer	=
Revenue Officer	=
Representative	=
Entity	=
Year 1	=

ISSUE

Whether the period of limitations for determining whether a protest is timely under section 6672 may be restarted by reissuing the original Letter 1153, Notice of Proposed Assessment, with a new date.

CONCLUSION

The period of limitations for determining whether a protest is timely under section 6672 commences with the date on the original Letter 1153 and cannot be restarted by reissuing the original letter with a new date.

FACTS

The Service determined that Taxpayer was responsible for the trust fund recovery penalty (TFRP) under section 6672 for certain quarters. Under section 6501, the period of limitations for assessing the TFRP was to expire on April 15, Year 1. On March 30, Year 1, Revenue Officer gave Taxpayer the notice described in section 6672(b) by issuing a Letter 1153, Notice of Proposed Assessment, to Taxpayer by mail at his correct last known address, a location within the United States. The letter informed Taxpayer that the IRS intended to assess a penalty against him and advised him of his right to appeal or protest the proposed assessment of the TFRP described in the Letter 1153. The Letter 1153 further stated that to preserve appeal rights, a taxpayer needs to mail (to the Service's designated contact person) a written protest or appeal within 60 days from the date of the Letter 1153 (75 days if the letter is addressed to the taxpayer outside the United States). Attached to the Letter 1153 was Form 2751, Proposed Assessment of Trust Fund Recovery Penalty.

On April 13, Year 1, Revenue Officer received a Form 2848, Power of Attorney and Declaration of Representative, and a letter from Representative dated April 12, Year 1. Representative stated that:

I represent Taxpayer and enclose the following items:

1. IRS Form 2848 Power of Attorney and Declaration of Representative; and
2. Copy of an IRS letter dated March 30, Year 1 to Taxpayer regarding a proposed penalty under Section 6672 for certain unemployment taxes related to Entity ("Letter").

The Letter states that a Form 2751 is enclosed that describes the taxes that are the subject matter of the Letter. However, no Form 2751 was enclosed with the Letter as it was received by Taxpayer. Accordingly, we ask that you re-issue the Letter with the Form 2751 enclosed and with a new mailing date. In the event that we need to appeal or protest within 60 days of the date of the letter, the 60-day period should start upon the mailing date of the re-issued Letter.

Revenue Officer had included the Form 2751 with the original Letter 1153 dated March 30, Year 1, but reissued the Letter 1153 and Form 2751 to Taxpayer and Representative with a new date, April 13, Year 1.

The protest from Taxpayer in Revenue Officer's administrative file is dated June 8, Year 1. There is no postmarked envelope with the file nor is the protest letter date stamped by the Service. Revenue Officer states in his notes dated June 25, Year 1 that the protest was received on June 11, Year 1 while Revenue Officer was on vacation.

On July 12, Year 1, Taxpayer's TFRP liabilities were sent for assessment with a transmittal cover indicating that the earliest Assessment Statutory Expiration Date (ASED) was July 12, Year 1 based on the "restart" date.

LAW AND ANALYSIS

Section 6672, Failure To Collect or Pay Over Tax, or Attempt To Evade or Defeat Tax, also commonly referred to as the trust fund recovery "penalty", imposes a one-hundred percent penalty on "responsible persons" if the responsible person willfully fails to pay over to the government the amount of taxes otherwise due. Wood v. United States, 808 F.2d 411 (5th Cir. 1987). Courts have held that the section 6672 penalty is a return based penalty, because it is not separate and distinct from the underlying employment tax liability. Rather, the penalty is a mechanism for collecting the underlying employment tax liability. Therefore, the assessment of the section 6672 penalty is subject to the period of limitations on assessment provided in section 6501. See, e.g. Lauckner v. United States, 68 F.3d 69 (3rd Cir. 1995), aff'g 1994 U.S. Dist. LEXIS 17187 (D.N.J. 1994), acq., A.O.D. 1996-006, 1996-2 C.B. 1.

Section 6672(b) requires that the taxpayer be sent a 60-day notice of proposed assessment before notice and demand for payment of the TFRP can be made. The 60-day notice, Letter 1153, advises the taxpayer of the proposed penalty and their appeal rights before a TFRP is assessed. The taxpayer may agree to the penalty by returning a signed Form 2751. If the taxpayer disagrees with the proposed penalty, the taxpayer may file a written protest within 60 days. If the Service issues the 60-day notice before the expiration of the period of limitation under section 6501(a), the ASED will not expire before the later of: (A) the date 90 days after the date on which the notice is mailed or delivered in person, or (B) if there is a timely protest of the proposed assessment, 30 days after the Service makes a final administrative determination with respect to the protest. I.R.C. § 6672(b)(3)(A) and (B). The Service issued the 60-day notice, Letter 1153, to Taxpayer on March 30, Year 1, before the expiration of the section 6501(a) period of limitation on April 15, Year 1.

A "timely protest" for purposes of section 6672(b)(3)(B) is not defined in the Code, by regulation, or in the legislative history. Nevertheless, the Service has consistently described the meaning of a "timely protest" for this section by reference to the time frames identified in the Letter 1153. The Service's form Letters 1153 have consistently identified 60 days from the date of the letter as the time period for a taxpayer (within the United States) to provide the Service with a written protest or appeal in order to preserve the taxpayer's pre-assessment appeal rights. No case law exists on this issue likely because the Service has maintained a consistent administrative position on this

issue. A protest is considered timely if it is postmarked or mailed by certified mail on or before the 60th day after the mailing date of the Letter 1153 or from the delivery date if the Letter 1153 is personally delivered. I.R.C. § 7502. Where there is no timely protest the assessment period of such penalty does not expire before the date 90 days after the issuance of the 60-day notice. See I.R.C. §§ 6672(b)(3)(A) and 6501(a).

Any contention Taxpayer may make that he did not receive a proper 60-day notice because a Form 2751 was not enclosed is misguided at best. It is the Letter 1153 which confers appeal rights upon the taxpayer, not the Form 2751. Indeed, the Form 2751 by its very purpose is only necessary where the taxpayer intends to agree to the penalty.

We have found no legal authority which would permit the restarting of the period of limitations through the reissuance of the original Letter 1153 with a new date. Section 6672(b)(3) is clear in stating that the period of limitations can only be extended past the 90 day period if a timely protest is filed. There is nothing to indicate that the issuance of more than one Letter 1153 for a specified tax period was contemplated.

Taxpayer does not dispute that he received the Letter 1153 issued on March 30, Year 1. Therefore, March 30, Year 1, the date on the original Letter 1153 is the correct date from which the ASED should be measured. Taxpayer's protest must have been postmarked no later than May 29, Year 1 in order to be timely. At the earliest, Taxpayer's protest was received on June 8, Year 1 and was, therefore, untimely. Because no timely protest was received, the ASED expired on June 28, Year 1. The Service's assessment on July 12, Year 1, was also untimely. The assessment should be abated in accordance with section 6404(a)(2).

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

If you have any questions regarding this advice, please contact the attorney assigned to this case at .